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SERVICE DATE - JUNE 24, 1999

SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. MC-C-35000

TRIPLE E TRANSPORT, INC. —
PETITION FOR DECLARATORY ORDER

Decided: June 21, 1999

By decision served May 12, 1998, in this proceeding, the Director of the Office of Proceedings (Director) denied a petition by Triple E Transport, Inc. for a declaratory order to resolve a dispute over whether a certain shipment of property by motor carrier moved in common carriage or in contract carriage. The Director concluded that the Board should not exercise its discretion under 5 U.S.C. 554(e) and 49 U.S.C. 721 to issue a declaratory order because petitioner had failed to show that the Board's expertise is required to resolve this dispute. Specifically, he found that 49 U.S.C. 13710(b)¹ does not require the Board to resolve this controversy, because it was the purpose of that section to resolve rate applicability disputes, and a rate is not at issue in this case. Petitioner has filed a petition for reconsideration,² and U.S. Pipe & Foundry Company (U.S. Pipe) has replied. We have considered the petition for reconsideration and the reply and conclude that the petition for reconsideration should be granted. We are therefore instituting a declaratory order proceeding.

BACKGROUND

¹ RESOLUTION OF DISPUTES OVER STATUS OF COMMON CARRIER OR CONTRACT CARRIER.—If a motor carrier (other than a motor carrier providing transportation of household goods) that was subject to jurisdiction under subchapter II of chapter 105, as in effect on the day before the effective date of this section, and that had authority to provide transportation as both a motor common carrier and a motor contract carrier and a dispute arises as to whether certain transportation that was provided prior to the effective date of this section was provided in its common carrier or contract carrier capacity and the parties are not able to resolve the dispute consensually, the Board shall resolve the dispute.

² The petition for reconsideration was initially tendered June 2, 1998, but the applicable filing fee was not paid until July 27, 1998. An appeal of the Director's decision lies with the Board but, under 49 CFR 1011.2(a)(7), it must be filed within 10 days after service of the decision. Because U.S. Pipe did not object to the petition being late-filed, and in order to resolve this controversy, the petition will be accepted.

Triple E and U.S. Pipe signed a Master Transportation Agreement dated March 1, 1992, that contained a provision indemnifying U.S. Pipe against certain losses. On October 18, 1993, U.S. Pipe tendered to Triple E a shipment of ductile iron pipe at Birmingham, AL, for interstate movement. Triple E's vehicle was involved in an accident in which a motorist died, and the decedent's estate brought a wrongful death suit against Triple E and its driver, U.S. Pipe, and another motorist. This litigation was settled in May 1996, with U.S. Pipe paying \$250,000 above the insurance payments from the insurer of Triple E and the other motorist. U.S. Pipe sought reimbursement from Triple E for its payment in the suit. Triple E refused payment, and U.S. Pipe brought an action against Triple E in Alabama state court.³

Subsequently, Triple E filed its declaratory order petition, seeking a determination that the service it provided was not contract carriage so that the indemnity provision was not enforceable. Triple E argues that, under the definition of a contract carrier found at former 49 U.S.C. 10102, it did not provide contract carrier service because it did not meet the "distinct needs" of U.S. Pipe nor did it assign vehicles for U.S. Pipe's exclusive use.⁴

The Director found that the Board was not required to resolve the dispute under 49 U.S.C. 13710(b). That section, he reasoned, was enacted to resolve controversies over rates and charges, while this controversy concerned "issues of civil liability and potential subrogation rights under the contract, matters of general law as to which we have no special expertise to bring to bear." Decision at 2.

CONTENTIONS OF PARTIES

Triple E argues on appeal that the Board has a responsibility to use our expertise to make the contract or common carriage determination. It contends that the operation of the relevant statutory section is not limited to rate questions, but that the "highly technical" determination of common/contract carriage can be made in connection with non-rate matters.

Triple E also argues that this proceeding does involve rates. It claims that U.S. Pipe has not paid it common carrier rates since 1992, even though every shipment moved under a Uniform Bill of Lading stating that the movement was "subject to tariffs and classifications" Triple E asserts

³ The suit was filed before the Circuit Court of Jefferson County, Alabama in U.S. Pipe v. Triple E Transport, Inc., CV96-3625 JDC.

⁴ Contract carriers provided transportation services for shippers under continuing agreements by: (1) assigning vehicles for a continuing period of time for the exclusive use of such shippers, or (2) providing transportation services designed to meet the distinct needs of the shippers. Former 49 U.S.C. 10102(16).

that receipt by U.S. Pipe of an indemnity and of the extra insurance coverage provided by Triple E would constitute a rebate.

In reply, U.S. Pipe argues that the Director made a proper determination of the Board's jurisdiction. It also submits that Triple E does not have standing to claim that additional insurance coverage discriminates against shippers because, under Title 49, chapters 147 and 149, only the Secretary of Transportation, the Board, or persons injured by a carrier may enforce the rebate provisions of the statute.

DISCUSSION AND CONCLUSIONS

Under 5 U.S.C. 554(e), the Board has discretionary authority to issue a declaratory order to terminate controversy or remove uncertainty. The Interstate Commerce Commission and the Board have exercised broad authority in handling such requests, considering a number of factors, including significance to the industry and ripeness of the controversy. Delegation of Authority—Declaratory Order Proceedings, 5 I.C.C.2d 675, 676 (1989).

Under the Board's authority in 5 U.S.C. 554(e) and 49 U.S.C. 721, we will institute a declaratory order proceeding to resolve the controversy here. The Board's authority to resolve common/contract carrier disputes under section 13710(b) is not expressly limited to controversies over rates and charges. Rather, under that section, the Board is directed to resolve disputes "as to whether certain transportation . . . was provided in its common carrier or contract carrier capacity. . . ." Thus, we can resolve common/contract carrier controversies when they concern issues within our jurisdiction.

The issue raised by Triple E — whether the indemnity provision and the extra insurance coverage constitute a rebate — is clearly within our jurisdiction, and indeed relates to rates and charges. Triple E is entitled to make its case on this issue.⁵

Triple E should submit evidence as to what, if any, tariff authority it claims the shipment moved under. It should also, if possible, submit a clearer copy of the bill of lading, as some of its terms on the copy submitted with the petition are difficult to read. Finally, the parties should explain the rate reference in the bill of lading to "1.83/CWT," and whether this rate is based on a tariff or contract.

⁵ U.S. Pipe makes a broad argument that Triple E lacks standing to raise the rebate issue, but we have found nothing in the statute or our precedent that precludes a carrier from seeking a declaratory order finding under section 13710(b) based on a rebate question. Cf. Wheaton Van Lines - Petition for Declaratory Order, 339 I.C.C. 1 (1970) (finding in declaratory order proceeding that the use of the Good Housekeeping consumers' guarantee by a motor common carrier of household goods was not a rebate).

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. A declaratory order proceeding is instituted. This proceeding will be handled under the modified procedure, on the basis of written statements submitted by the parties. All parties must comply with the Rules of Practice, including 49 CFR 1112 and 1114.

2. Petitioner's opening statement is due July 26, 1999.

3. Respondent's reply is due August 13, 1999.

4. Petitioner's rebuttal is due August 30, 1999.

5. This decision is effective on its service date.

By the Board, Chairman Morgan, Vice Chairman Clyburn and Commissioner Burkes.

Vernon A. Williams
Secretary